No. 87-2048

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

TEXACO INC.,
Petitioner,
v.
RICKY HASBROUCK, d/b/a RICK'S TEXACO, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE AMERICAN PETROLEUM INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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July 15, 1988

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MOTION OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE AMERICAN PETROLEUM INSTITUTE FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

The National Association of Manufacturers of the United States of America ("NAM"), and the American Petroleum Institute ("API") hereby seek leave, under Rule 36.1 of the Rules of this Court, to file the accompanying brief as *amici curiae* in support of the petition by Texaco Inc. ("Texaco") for the issuance of a writ of certiorari to the Court of Appeals for the Ninth Circuit to review its *Hasbrouck* decision. NAM and API are compelled to make this application as only petitioner consented to their

participation as *amici curiae*; respondents, through their counsel, refused such consent.

NAM is a non-profit voluntary business association incorporated under the laws of the State of New York. NAM represents some 13,000 companies located throughout the nation's fifty states, providing 85 percent of this country's manufacturing employment. NAM businesses account for fully 80 percent of all domestically manufactured goods. NAM is likewise affiliated with 158,000 additional businesses through its relationship with the Associations Council and the National Industrial Council.

API, a District of Columbia corporation, is likewise a national trade association. It counts over 200 companies among its membership representing all facets of the petroleum industry: exploration, production, transportation, refining, and marketing. Many of API's members are involved in marketing at both the wholesale and retail levels.

As a principal spokesman for America's manufacturing community, NAM has had a long history of interest and involvement in matters affecting marketing and distribution. In that role, NAM has participated repeatedly as *amicus curiae* before this Court on issues critical to the nation's industry. So too, API has routinely participated on its industry's behalf in legislative, administrative, and judicial proceedings which present issues of national concern. NAM and API believe that the Ninth Circuit's *Hasbrouck* decision presents just such an issue.

The decision below declares that it is unlawful for a seller to charge a legitimately classified single-function wholesaler less than a direct-purchasing retailer even though there is no competition between functional levels. In so ruling, the Ninth Circuit casts doubt on the legality of the customary and widespread practice of granting wholesalers a discount in compensation for their performing distributive functions. Under *Hasbrouck*, manufacturers and suppliers that maintain dual channel distribution, *i.e.*, that sell to both wholesaling distributors and retail dealers, are now subject to the threat of treble damages.

Plainly, the implications of the *Hasbrouck* panel's opinion go far beyond the specific dispute between the parties here to encompass questions that affect the marketing and distribution not just of gasoline or petroleum products in Spokane, Washington but of all goods and commodities for sale throughout the nation. By condemning the wholesaler discounts in *Hasbrouck* as price discrimination, the Ninth Circuit raises fundamental questions for all manufacturers and suppliers about whether any such practices can be continued consistent with the Robinson-Patman Act, 15 U.S.C. §§ 13(a), 13(b), and 21(a) (1982 & Supp. IV 1986) (the "Act"). Moreover, as that decision is in conflict with those of other Courts of Appeal that have passed on the matter, manufacturers and suppliers throughout the United States may now be subject to differing and inconsistent standards of commercial conduct.

The memberships of both NAM and API have a vital interest in this Court's review of the *Hasbrouck* decision because many of them employ discounts in dual channel distribution systems to compensate for the wholesaling function. Likewise, many of the companies represented by API and NAM do business throughout the nation and in all the judicial circuits. These businesses need a uniform Robinson-Patman Act interpretation that only a decision by this Court can provide.

Moreover, NAM and API believe their participation as *amici curiae* on the issue of certiorari will not only serve to provide this Court with a uniquely broader perspective on the questions raised by Texaco's petition but will bring into focus the national significance of the distribution issue at the heart of this case and thereby under-

score the critical need for this Court's review of the decision below. Accordingly, NAM and API urge that leave be granted for the filing of their brief.

Dated: July 15, 1988

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QUESTION PRESENTED

Can the trade discounts customarily accorded by manufacturers and suppliers that permit wholesalers to pay less than direct-purchasing retailers ever be the basis for a Robinson-Patman Act price discrimination claim by a retail customer of a supplier when the challenged discounts are uniform and nondiscriminatorily available to all competing wholesalers?

The court below answered this question in the affirmative, holding that functional discounts are presumptively unlawful unless they are limited to the cost incurred by each wholesaler in the performance of distributive functions, or unless no part of the discount is passed through to retailers who might thereby be favored over competing direct purchasing retailers.

In so holding, the Ninth Circuit upended decades of Robinson-Patman Act learning to the effect that, in such circumstances, there is neither discrimination nor competitive injury. The court below insisted instead that the Act countenances only an unworkable regime, mandating discounts that discriminate among wholesalers on the basis of their respective costs—something a manufacturer would have no way of knowing—and requiring, in conflict with the dictates of the Sherman Act, that a supplier police the pricing decisions of its wholesalers to ensure that no portion of any wholesale discount is passed down the distributive chain.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

TABLE OF AUTHORITIES—Continued

Statutes and Rules: Page

Miscellaneous:

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE AMERICAN PETROLEUM INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF THE CASE

The facts relevant to this Court's consideration of the certiorari petition are simple and few:

During the period 1972 to 1981, the respondents, twelve owners of retail service stations located in the Spokane, Washington area, purchased gasoline directly from petitioner Texaco Inc. for resale to the motoring public under the Texaco brand name. Contemporaneously,

Texaco also sold its gasoline to John Dompier Oil Company and Gull Oil Company, two Spokane-based independent wholesalers. Texaco charged them the discounted price it charged all wholesalers, which was lower than the price Texaco charged its direct purchasing Spokane area retailers, such as plaintiffs. Dompier and Gull, in turn, sold the Texaco gasoline to independent retail service stations, some of which competed with plaintiffs.

The plaintiff direct-served retailers claimed that they were injured by Texaco's grant of a uniformly available wholesale discount to Dompier, because that distributor, from time to time, independently decided to pass on some portion of that discount to the service station customers which were in competition with the plaintiffs.[1] This, plaintiffs charged, resulted not only in their competitors being charged a lower price for gasoline than Texaco charged them but also permitted those retailers supplied by Dompier to pass some of their savings on to the consuming public. Plaintiffs alleged that, as a consequence, they lost sales that they otherwise would have made to Washington state mortists.

Plaintiffs argued that the competitive disadvantage to which they were subjected by virtue of Texaco's trade discount rendered the difference in price charged wholesalers and retailers actionable as "price discrimination" under section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1982 and Supp. IV 1986) and that the resulting lost sales were tantamount to the "competitive

[1] As Gull did not sell gasoline under the Texaco brand, plaintiffs did not seek damages from Texaco's grant of a wholesale discount to Gull. A-5; B-15; ER 386; 424-45. While Dompier, during the latter part of the period for which damages were sought, acquired some retail outlets, the case appears to have been tried and decided on the premise that Dompier was a properly classified single-function wholesaler. ER 529-30.

injury" proscribed by that statute. Plaintiffs urged that, though Texaco exercised no control over either the pricing decisions of its independent wholesalers or the subsequent pricing determinations made by customers of Dompier, Texaco should nonetheless be responsible in damages for what plaintiffs charged was a tertiary line violation of the Act.[2]

Texaco defended itself by proving that it sold to all wholesalers at the same uniform price and that its wholesale discount was available to all distributors. A-7. It disavowed any control over the prices at which Gull and Dompier resold gasoline and likewise disowned any influence over the prices at which the service stations that were customers of Dompier and Gull sold gasoline to the consuming public. A-15 n8. Plaintiffs challenged none of this.

Confronted with a classic trade discount, the Ninth Circuit began its analysis correctly by observing:

> Manufacturers are permitted to use price differentials, commonly known as wholesale or functional discounts, to compensate certain classes of buyers for the distributional services they perform [citations omitted]. For this reason, goods may generally be sold to wholesalers at a lower price than that charged [by manufacturers or suppliers] to retailers.

A-7.

[2] Courts have come to classify Robinson-Patman Act cases on the basis of the functional level of the distribution chain on which the competitive effects are felt and the injury claimed. Thus, if a manufacturer or supplier, by price discrimination, attracts the custom of its business rival, which thereafter sues, the claim against the seller is one for a "primary line" violation. If the competitor of a favored purchaser sues the offending seller, the case is a "secondary line" claim. Injury suffered by those competing with the customer of a favored purchaser occurs at the "tertiary line." *See* Guyott Co. v. Texaco Inc., 261 F. Supp. 942, 949 (D. Conn. 1966).

The court below likewise acknowledged:

> We recognize that, generally, selling at different prices to customers who are at different levels of distribution will not constitute a violation of the Robinson-Patman Act [citations omitted].

A-9.

The *Hasbrouck* panel nonetheless held that the lower prices that Texaco charged Gull and Dompier constituted unlawful price discrimination because those prices were "functional discount[s] in excess of the value of the services [Gull and Dompier] perform, all or a portion of which [those wholesalers] then pass on to the retailers they supply." A-7, A-8. The Ninth Circuit thus declared that even though a wholesale discount is uniform and nondiscriminatorily available to all middlemen, and there is no competition between retailers and wholesalers, a seller's lower price to a pure single-function wholesaler is still unlawful if it is not "cost-based" and if any part is "passed on" to customers who compete with a direct-purchasing retailer. A-8.

Having thus found price discrimination, the Ninth Circuit then went on to hold Texaco liable for the independent pricing decisions of both its wholesalers, Gull and Dompier, and the retail service stations who were their customers. Acknowledging that Texaco could not, under the Sherman Act, dictate resale prices, the court below nevertheless held that, "as a matter of law," the Act required that a manufacturer be held responsible for the consequences of decisions by others that is legally incapable of controlling. As support for this singular proposition, the *Hasbrouck* panel argued that were it otherwise "[t]hat view would preclude all Robinson-Patman claims involving secondary and tertiary line injury. . . ." A-15, n8. In the view of the court below, all that was required to impose such vicarious liability was an "inference" that the claimed harm had "flowed" from the original wrong and that the prohibited discount was a "material cause" of the injury claimed. A-13, A-14.

SUMMARY OF ARGUMENT

The Ninth Circuit's *Hasbrouck* decision adopts the novel position that traditional trade discounts allowing wholesalers to pay less than direct-purchasing retailers are a violation of that Act's prohibition on price discrimination. In so ruling, the Ninth Circuit may well have erected a standard of conduct in conflict with that maintained by other appeals courts as well as the Federal Trade Commission, the agency charged with the Act's principal enforcement responsibility. The *Hasbrouck* panel has not only upset settled notions of law but has also thereby exposed a majority of America's manufacturers and suppliers to treble damages for what has long been regarded as a customary and legitimate way of doing business.

In the contrary view of the Ninth Circuit, it appears that a manufacturer may not charge a wholesaler a lower price than a direct-purchasing retailer—even though they do not compete—unless the challenged discount is equal to no more than the cost incurred by that wholesaler in performing its distributive function or unless no portion of that discount is passed on to the retail level.

In so holding, the court below seems to require that the legality of a wholesale discount be determined by something a manufacturer can have no way of knowing: the precise costs incurred by each individual wholesaler with which it deals. So too, in contradiction to the Act's goal that all competitors be treated alike, the decision mandates that a manufacturer custom tailor discounts to each individual wholesaler, thus discriminating between and among competitors. The Ninth Circuit's decision also requires, to ensure the legality of a wholesale discount, that the manufacturer or supplier police the pricing decisions of the independent wholesalers with which it deals to make certain that no portion of the discount is passed on to the retail level, lest direct-purchasing retailers have

a tertiary line price discrimination claim under the Act. This, of course, invites a resale price maintenance violation of the Sherman Act, 15 U.S.C. §§ 1-7 (1982 & Supp. IV 1986).

The Ninth Circuit's ruling is as unmanageable as it is unrealistic. It threatens traditional patterns of distribution and makes law-abiding manufacturers liable for the independent business decisions of others over whom they exercise no control. Under the *Hasbrouck* panel's marketing regime, a manufacturer that sells directly to retailers will be taking a considered risk in dealing with a wholesaler. A supplier will have to consider the benefits of confining its sales activity to either the wholesale or retail level. Similarly, as no wholesale discount can exceed the costs incurred by a distributor in performing its function, there is no margin of profit for the wholesaler. The net effect is to deter, if not make impossible, the use of independent local businesses as distributors and, for larger suppliers, to encourage vertical integration into wholesaling. Such enterprises exist because of the economies they provide manufacturers in the marketing of their products. The *Hasbrouck* decision will be particularly burdensome for smaller suppliers who cannot integrate the distributive function. The Ninth Circuit's decision hence encourages inefficiency and, in derogation of one of the principal aims of the antitrust laws, diminishes consumer welfare.

None of this is compelled by the Robinson-Patman Act. The Ninth Circuit's unprecedented decision is faithless to the statutory intent of the Act's draftsmen. Equally so, that decision is irreconcilable with the dictates of the Sherman Act. The Ninth Circuit's erroneous decision is premised on a fundamental misapplication of three of this Court's decisions. Review by this Court is essential not merely to correct what is an obviously improvident decision, but more important, to validate once again a long-standing, widely-accepted marketing practice followed by a majority of the nation's manufacturers. Only this Court's precedent can restore the uniformity of decision demanded by interstate commerce and provide the clarity lacking in an area of law now thoroughly confused and in disarray.

REASONS FOR GRANTING THE WRIT

A. If *Hasbrouck* Had Been Tried In Another Circuit, It Might Well Have Been Decided Differently.

The *Hasbrouck* decision is unprecedented and threatens to undermine perhaps the most common distributional arrangement in American business: the dual channel system in which a manufacturer or supplier sells to wholesalers at discounted prices lower than those it charges direct purchasing retailers. Until the decision below, it had been an article of faith that no actionable competitive injury, within the meaning of the Robinson-Patman Act could result, when a manufacturer or supplier charged two different prices to purchasers who operated entirely at different levels of resale distribution so long as all competing purchasers on the same level were treated alike and the greater discount was accorded on a uniform, nondiscriminatory basis to a buyer higher up the distributive chain.

Functional discounts have been a part of our economy since long before the 1936 enactment of the Robinson-Patman Act. *See Boise Cascade Corp.*, [1983-1987 FTC Complaints and Orders transfer binder] Trade Reg. Rep. (CCH) ¶ 22,330 at 22,399-400 (1986), *rev'd on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988).

Time and time again, when the courts have been called upon to assay the lawfulness of this practice in cases involving the claimed discrimination in the prices charged by a seller to two customers performing different functions, they have confirmed its fundamental legality. *E.g.*, the Fifth Circuit: *Eximco, Inc. v. Trane Co.*, 737 F.2d 505,

515 (5th Cir. 1984) (to make out a price discrimination claim there must be "a sale to two different buyers *at the same functional level* of competition, charging different prices to each") (emphasis added); the Seventh Circuit: *O'Byrne v. Cheker Oil Co.*, 727 F.2d 159, 164 (7th Cir. 1984) (as "neither the company's own dealers nor those dealers' ultimate purchasers are competing purchasers vis a vis independent dealers like plaintiffs . . . the Robinson-Patman Act is inapplicable"); and, the Tenth Circuit: *Dart Indus., Inc. v. Plunkett Co. of Oklahoma*, 704 F.2d 496, 499 (10th Cir. 1983) (in the absence of competition, "[t]he difference in the prices charged to Plunkett [a distributor] and those charged to direct [retail dealer] accounts such as Oklahoma Fixtures do not constitute a Robinson-Patman violation.").

The most recently reported Court of Appeals decision to consider the propriety of functional discounts for single-function wholesalers underscores the exceptional nature of the *Hasbrouck* panel's decision:

> [T]o hold that [grant of a] distributors' discount [larger than that available to a dealer] violates § 2(a) in this circumstance would effectively abolish two channel distribution systems in all industries [footnote omitted]. [Plaintiff] cites no authority for this extraordinary interpretation of the Act, nor can we find any.

White Indus., Inc. v. Cessna Aircraft Co., 1988-1 Trade Cas. (CCH) ¶ 67,992 at 58,086 (8th Cir. 1988).

The Ninth Circuit's *Hasbrouck* decision did more, however, than merely challenge the long-standing and well-settled view that trade discounts accorded single-function wholesalers are not prohibited by the Robinson-Patman Act. That court also appears to have declared that functional discounts are presumptively unlawful unless they are limited to the cost incurred by each wholesaler in the performance of distributive functions, or permissible only

so long as no part of the discount is passed through to retailers. A-9, A-10. In so holding, the court below announced a rule that mandates that manufacturers and suppliers who wish to compensate wholesalers for their distributive activity must discriminate between and among competing purchasers at that functional level on the basis of the costs each incurs.

Leaving aside that no manufacturer or supplier could ever know and be able to quantify the precise distributive costs actually shouldered by each of its wholesalers, the resulting regime of disparate treatment would plainly violate the Act. *See Mueller Co. v. FTC*, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964); *White Indus. Inc. v. Cessna*, 1988-1 Trade Cas. (CCH) at 58,086 n4. As this Court explained in *FTC v. Sun Oil Co.*, 371 U.S. 505, 520 (1963), the purpose of the Robinson-Patman Act is "to assure, to the extent reasonably practical, that businessmen at the same functional level would start on equal competitive footing so far as price was concerned."

Equally remarkable is the *Hasbrouck* panel's suggestion that sellers may have to police the resale prices of their wholesalers to ensure that no part of a distributor's discount is passed on to the next level. Any such attempt by a manufacturer would surely subject it to claims of resale price maintenance. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44, 46-47 (1960). And, attempted compliance with the Robinson-Patman Act would not be accepted as a defense. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 458-59 (1978).

The Ninth Circuit's ruling leaves thousands of businesses subject to what appear conflicting standards of conduct and without the necessary assurance that a distributor's marketing activity can be acknowledged through the use of wholesale discounts. Review by this Court is essential to assure uniformity as well as to pro-

vide needed guidance to the business community. As the *Boise Cascade* panel noted:

> [T]he uncertain status of functional discounting is primarily due to the failure of Congress, the Federal Trade Commission, and the courts to give explicit and independent recognition to the practice and to define with any modicum of specificity its permissible contours. The result of this failure of recognition has been a lack of focus upon the validity of the functional discount which, in turn, has left the law in a state of confusion, causing often legitimate practices to be condemned.

837 F.2d at 1140 (quoting Calvani, Functional Discounts Under the Robinson-Patman Act, 17 Boston C. Indus. & Com.L.Rev. 542, 542-44 (1976)).

B. The *Hasbrouck* Decision Raises A Critical Question Of National Economic Policy. If Allowed To Stand, It Imperils The Continued Use Of Dual Channel Distribution By Manufacturers And Threatens This Country's Markets With Otherwise Unnecessary Distributional Inefficiencies.

Underlying the decision of the court below is a fundamental misunderstanding of the role that wholesaler discounts play in a dual channel distribution system. The challenged discounts are not merely designed to offset the costs of performing distributive functions that cannot be expected of direct purchasing retailers. Their purpose is also to attract enterprises as middlemen that, for a reasonable return, will perform these distributive functions, often including marketing, more effectively and more efficiently than could the manufacturer or supplier by integrating those functions into its own operation. Indeed, many smaller suppliers simply lack the resources to integrate distributive functions and, thus, must rely on middlemen. The decision of the court below poses a serious threat to the businesses of these smaller suppliers.

By insisting that wholesale discounts not exceed the costs actually incurred by a particular wholesaler in the performance of distributive functions, the *Hasbrouck* decision eliminates any return for the risks assumed and any reward for the marketing effort undertaken. Surely, under such a regime, where all the profit is reserved to direct-purchasing retailers, no business would willingly become a middleman. As such middlemen would not exist in dual channel systems unless they could perform the distribution of a product more efficiently than its manufacturer or supplier, *Hasbrouck's* rule, which tends to eliminate these wholesalers, must perforce result in less efficient distribution.

Yet another unanticipated effect of the *Hasbrouck* decision is that it tends to discourage the formation and continuation of small independent businesses concentrating on distribution and to encourage vertical integration forward into the distribution chain by manufacturers. Mandating such consequences as a result of the Robinson-Patman Act doubtless would shock the Act's draftsmen who were motivated by the desire to protect small business against predatory concentrations of power. *See* U.S. Dept. of Justice, Report on the Robinson-Patman Act, 101-39 (1977).

Perhaps the most immediate consequence of the *Hasbrouck* decision is to make the use by a manufacturer or supplier of a dual channel distribution system too risky to be continued. Because a manufacturer has no way of knowing with precision the exact distributive costs incurred by each of its wholesalers, it could not effectively administer any but the most nominal discounts with the assurance that they would meet *Hasbrouck's* cost-based test. *See* A-7, A-8. Moreover, even if a manufacturer possessed the ability to design for each of its wholesalers discounts that avoided the Ninth Circuit's condemnation, the discrimination inherent in such pricing

would subject its architect to Robinson-Patman Act liability.[3]

In addition to the risks *Hasbrouck* imparts to setting wholesale discounts, that decision also mandates that manufacturers take the risk of policing the pricing decisions of discount recipients to ensure that no part of the discounts is passed on down to the retail level. Leaving aside whether it is fair to make manufacturers and suppliers liable for the acts of those over which they exercise no control, this *Hasbrouck* directive effectively exchanges the risk of price discrimination liability under the Robinson-Patman Act for treble damage exposure under the Sherman Act for resale price maintenance. *See Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

In the face of these multiple risks created by the *Hasbrouck* decision, certain compliance with the Robinson-Patman Act could be assured only by a manufacturer's discontinuing its dual channel and confining sales to distributors or integrating forward into the distribution chain and thereby internalizing the wholesaling function. The consequence of such a reordering of distribution in this country promises the introduction of substantial distributional inefficiencies in our economy and the reduction of consumer welfare.

The untoward consequences of the *Hasbrouck* decision cannot be squared with either the anti-discrimination

[3] Under this Court's *Anheuser-Busch* decision, "a price *discrimination* within the meaning of . . . [the § 2(a) phrase "discriminate in price"] is merely a price *difference*." FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 549 (1960) (emphasis supplied). While this Court went on to point out that not all price differentials are *illegal* under Section 2(a), since there are other elements to the violation, as well as various defenses available, 363 U.S. at 553, the differential discounts apparently required under the Ninth Circuit's *Hasbrouck* formulation would set up one of the elements of a prima facie Section 2(a) violation, leaving sellers that grant them with the burden of proving a defense.

aims of the Robinson-Patman Act or with the consumer welfare maximization goals of the other antitrust laws. The Ninth Circuit's *Hasbrouck* decision represents a serious departure from the national economic policy embodied in the antitrust laws that this Court must now correct.

C. The *Hasbrouck* Decision Rests On A Misreading Of The Precedents Of This Court.

In support of its singular interpretation of the Robinson-Patman Act, the Ninth Circuit summoned (A-8) but three case citations: *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948); *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983); and *Perkins v. Standard Oil Co. of California*, 395 U.S. 642 (1969). None of these cases lends precedential support to *Hasbrouck*.

In *Morton Salt*, the FTC attacked two forms of price discrimination. The first was Morton Salt's practice of charging competing wholesalers different prices; a traditional violation of the Act. The second practice at issue was Morton Salt's charging certain large grocery chainstore retailers less than the prices charged wholesalers who sold to the favored retailers' competitors. 334 U.S. at 41. Neither was at issue in *Hasbrouck*.

In fact, Texaco was found liable below for doing exactly the opposite of what Morton Salt had done. Unlike Morton Salt, Texaco treated all competing wholesalers alike. Indeed, it treated all purchasers, at each functional level, alike. Similarly, unlike Morton Salt, Texaco sold to wholesalers at prices uniformly lower than those charged to retailers.

The difference is significant. While charging a wholesaler less than a retailer involves no necessary competitive injury, the converse has a different impact. Granting a retailer a discount greater than that available to a wholesaler adversely affects the ability of the retail

customers of the disadvantaged distributor to compete with the favored retailer. Moreover, that result is foreordained by the pricing decision of the seller, regardless of the wholesaler's pricing.

In contrast, where a wholesaler is charged less than a direct-purchasing retailer, any effect on the ability of that independent distributor's retail customers to compete is attributable solely to the charge made by that wholesaler—a resale pricing decision that, as a matter of law, the seller cannot control and for which it therefore should not be liable.[4] *Morton Salt*, properly read, lends no support to the *Hasbrouck* panel's interpretation of the Robinson-Patman Act.

Nor can the *Hasbrouck* panel find support in this Court's opinion in *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983). The *Hasbrouck* court cites *Falls City* for its statement that:

> the competitive injury component of a Robinson-Patman Act violation is not limited to the injury to competition between the favored and disfavored purchaser; it also encompasses the injury to competition between their customers . . . .

460 U.S. at 436.

But the *Hasbrouck* panel overlooks the factual context in which this Court made the indicated remark. In *Falls City*, the defendant had charged different prices

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[4] *See* Barnosky Oils, Inc. v. Union Oil Co., 665 F.2d 74 (6th Cir. 1981):

> if the seller controls the sale, he is responsible for the discrimination in the sale price . . . . If the seller cannot in some manner control the sale between his immediate buyer and a buyer once removed, then he has no power by his own action to prevent an injury to competition.

Id. at 83-84 (quoting Purolator Prods., Inc. v. FTC, 352 F.2d 874, 883 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1968)).

to two wholesalers at the same functional level. Owing to the state liquor laws, the two purchasers, which were located in the adjoining states of Indiana and Kentucky, could not compete; one was restricted to selling to Indiana retailers, the other to Kentucky retailers. But, there was an interstate retail market and their respective customers could and did compete with one another. Hence, injury to those customers was cognizable under the Act to the extent it could be proved attributable to the seller's price discrimination at the wholesale level. 460 U.S. at 437. This, in no way suggests, as the Ninth Circuit appears to believe, that wholesale discounts are no longer lawful.

Perkins v. Standard Oil Co., 395 U.S. 642 (1969) is similarly inapposite. In the peculiar facts of that case, unlike this one, the favored purchaser controlled its resellers and retailers. *Id.* at 645. Thus, as in traditional secondary line injury cases, the disfavored purchaser could prove that the favored customer gained a competitive advantage by receiving a wholesaler's discount on products it actually sold as a retailer. *Id.* at 647-48.

The *Hasbrouck* interpretation of the Robinson-Patman Act is premised on a misreading of this Court's decisions and is, in fact, bereft of precedential support.

CONCLUSION

The Ninth Circuit's manifestly erroneous *Hasbrouck* decision, if not corrected by this Court, will cast doubt on the dual channel distribution practices of countless businesses throughout this nation. Unless this Court acts, the conflict created within the judicial circuits by *Hasbrouck's* perverse result will leave this country's manufacturers and suppliers subject to inconsistent and irreconcilable dictates regarding the legitimacy of extending trade discounts to single-function wholesalers. More

serious still, unless reversed by this Court, *Hasbrouck* has the very real potential of saddling our economy with unwarranted and needless inefficiencies that are in no way compelled by any rule of law. To address these nationally significant issues, this Court should grant the petition.

Dated: July 15, 1988

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